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No. 234

# In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

HENRY PRENTISS & COMPANY, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Specification of errors to be urged | 4 |
| Reasons for granting the writ | 5 |
| Appendix | 9–12 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Art Metal Construction Co.* v. *United States*, 47 F. (2d) 558, certiorari denied, 283 U. S. 863 | 5 |
| *Factors' & Finance Co.* v. *United States*, 56 F. (2d) 902 | 7 |
| *Feather River Lumber Co.* v. *United States*, 66 C. Cls. 54, certiorari denied, 279 U. S. 837 | 5 |
| *Jonesboro Grocer Co.* v. *United States*, 66 C. Cls. 320, certiorari denied, 280 U. S. 562 | 5, 6 |
| *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147 | 7 |
| *Memphis Cotton Oil Co.* v. *United States*, not yet reported, but see C. C. H. (1932) Vol. III, p. 8887 | 7 |
| *Mutual Life Ins. Co.* v. *United States*, 49 F. (2d) 662, certiorari denied, 284 U. S. 628 | 5 |
| *Solomon* v. *United States*, 57 F. (2d) 150 | 5 |
| *Swift & Co.* v. *United States*, 67 C. Cls. 322 | 7 |
| *Swift & Co.* v. *United States*, 68 C. Cls. 97 | 5 |
| *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269 | 6 |
| *Wausau Sulphate Fibre Co.* v. *United States*, 49 F. (2d) 665 | 5, 6 |
| *Zeller* v. *United States*, 46 F. (2d) 1023, certiorari denied, 283 U. S. 863 | 5 |
| Statutes: | |
| Revenue Act of 1921, c. 136, Sec. 252, 42 Stat. 227, 268 | 9 |
| Revenue Act of 1924, c. 234, Sec. 1012, 43 Stat. 253, 342 (U. S. C., Title 26, Sec. 157) | 9 |
| Revenue Act of 1926, c. 27, 44 Stat. 9, 66— | |
| Sec. 284 (U. S. C. Sup. V, Title 26, Sec. 1065) | 10 |
| Sec. 1113 (U. S. C. Sup. V, Title 26, Sec. 156) | 11 |
| Miscellaneous: | |
| Treasury Regulations 62, Art. 1036 | 12 |

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on April 18, 1932 (R. 169–170), reversing the judgment of the District Court for the Southern District of New York.

**OPINIONS BELOW**

The opinion of the Circuit Court of Appeals (R. 166–169) is reported in 57 F. (2d) 676. The opinion of the District Court (R. 53–70) is reported in 46 F. (2d) 159.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 18, 1932. (R. 169–170.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Respondent filed a claim for refund of its 1918 taxes stating specific grounds. The respondent was notified that the claim would be rejected. After the expiration of the statutory period for filing claims for refund and while the Commissioner was reconsidering the first claim, respondent filed an additional brief or "application for refund" setting forth the grounds upon which the present suit was brought. The question is whether respondent has complied with the statutes requiring claims for refund to be filed within a specified period and providing that no suit may be maintained for the recovery of a tax unless a claim for refund has been filed.

## STATUTES AND REGULATIONS INVOLVED

These are printed in the Appendix, pp. 9–12, *infra*.

## STATEMENT

This was an action at law in the United States District Court for the Southern District of New York to recover alleged overpayments of income and excess profits taxes for the years 1918 and 1920.

The District Court's findings of fact appear as allowances of the parties' requests for findings. (R. 71–91.) From them, the testimony, and the exhibits, the following facts appear:

Respondent filed its income and excess profits tax return for the year 1918 on June 16, 1919, and paid the tax shown to be due. On March 25, 1924, it filed a claim for refund on the grounds that it had failed to accrue any New York State tax and that because of abnormal conditions affecting income and invested capital it was entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918. (R. 84, 97.) These are not the grounds urged in the present suit. (R. 88–89.) By letter dated July 16, 1925, the Commissioner informed the respondent that "your claim will be rejected" and that the Collector would be notified officially. The rejection schedule containing the rejection of the claim was not signed by the Commissioner until September 3, 1926. (R. 85, 102–103.)

After the letter of July 16, 1925, informing respondent that its claim was to be rejected, but before the rejection schedule was signed by the Commissioner, the Commissioner reconsidered respondent's claim for special assessment and oral hearings were held on March 15 and April 12, 1926. (R. 38, 104–105.) On April 12, 1926, an additional brief or "application for refund" was filed. (R. 34, 37–38.)

The basis of the present suit was that the Commissioner had failed to include in invested capital a part of the value of respondent's real estate and had failed to make any allowance for good will. (R. 2–7, 9.) The District Court held that as to the 1918 taxes[1] the claim for refund was insufficient in that it did not set forth "all facts" relied upon within the meaning of the statutes and regulations. (R. 55–56.) The Circuit Court of Appeals reversed, holding that while the original claim did not embrace the grounds for recovery urged in this suit, the brief filed on April 12, 1926, was in effect an amended claim sufficient to advise the Commissioner, while the claim was under consideration, of the reasons put forth by respondent for its allowance, and that it therefore complied with the statute. (R. 166–169.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the amended claim for refund filed on April 12, 1926, after the expiration of the statutory period for filing claims for refund, was a sufficient compliance with the statute to permit maintenance of this suit.

2. In reversing the judgment of the District Court.

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[1] The 1920 taxes are not now in question.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with *Jonesboro Grocer Co.* v. *United States,* 66 C. Cls. 320, certiorari denied 280 U. S. 562; *Wausau Sulphate Fibre Co.* v. *United States,* 49 F. (2d) 665 (C. Cls.); *Swift & Co.* v. *United States,* 68 C. Cls. 97, 105, affirmed on another point, 282 U. S. 468; *Feather River Lumber Co.* v. *United States,* 66 C. Cls. 54, certiorari denied 279 U. S. 837; *Mutual Life Ins. Co.* v. *United States,* 49 F. (2d) 662 (C. Cls.), certiorari denied 284 U. S. 628. These cases all hold that a second or amended claim for refund is not a sufficient compliance with the statute and will not support a suit for the recovery of a tax where it is filed after the statute of limitations has run and when it sets up wholly different grounds from those relied upon in an original claim timely filed. See also *Art Metal Construction Co.* v. *United States,* 47 F. (2d) 558 (C. C. A. 2d), certiorari denied 283 U. S. 863; *Zeller* v. *United States,* 46 F. (2d) 1023 (C. C. A. 2d), certiorari denied 283 U. S. 863; *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d).

In the present case, after the Commissioner had notified respondent that he would reject the original claim, and before the rejection schedules had been signed, respondent filed the additional claim for refund. The fact that the Commissioner reconsidered his rejection and considered the second claim does not alter respondent's legal status. The

original claim did not state the grounds for refund advanced in this suit. The claim upon which this suit is based was filed after the expiration of the prescribed period for filing a claim for refund. The final action of the Commissioner was the rejection of the original claim. *Jonesboro Grocer Co.* v. *United States, supra; Wausau Sulphate Fibre Co.* v. *United States, supra.*

2. The decision below also seems to conflict in principle with the decision of this Court in *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, where it was held that the filing of a claim is a prerequisite to a suit and that the claim referred to by the statute is the claim asserted in the suit. The Court said that the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought. In the instant case the original claim gave no notice of the amount or nature of the claim for which the suit was brought. The second claim, upon which the suit was predicated, was not filed until after the statute had run. We believe that the statute requires that the claim which is the basis for the suit should have been timely filed.

While it is believed that the *Felt & Tarrant* case, *supra,* announced the proper principle to be applied in these cases, confusion results from decisions to the effect that defective claims for refund (as distinguished from general claims) may be amended after the running of the period of limita-

tions. *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147 (C. C. A. 2d); *Swift & Co.* v. *United States*, 67 Ct. Cls. 322. Further confusion is added by two recent decisions of the Court of Claims holding that a general claim for refund gives the Commissioner "jurisdiction" to refund an overpayment of taxes and stops the running of the statute of limitations, and that the general claim may be amended to state a specific ground at any time before the Commissioner makes his decision. *Factors' & Finance Co.* v. *United States*, 56 F. (2d) 902; *Memphis Cotton Oil Co.* v. *United States*, decided May 31, 1932, not yet reported but see C. C. H. (1932), Vol. III, p. 8887.[2]

In the case at bar the original claim was neither defective nor general, but was a wholly different claim from the second claim upon which the suit was based. It is believed that this Court should settle the law with respect to the sufficiency of supplemental claims filed after the running of the statute, in view of the existing confusion.

3. The question is of considerable importance in administering the Federal income tax laws, since it is one of frequent recurrence and is one which is not only involved in many cases now pending in

[2] The Government has filed a petition for certiorari in the *Factors, & Finance Co.* case (No. 141, October Term, 1932), and a petition will probably be filed by the Government in the *Memphis Cotton Oil* case. We respectfully suggest that the petitions be considered together and that, if granted, the cases be assigned for argument together.

the courts, but one which, as we are informed by the Treasury Department, may well arise in thousands of cases.

Under the decisions of the court below and the Court of Claims any claim, however old and whatever its basis, may now be amended, if it has not yet been passed on finally by the Commissioner, by filing a claim stating new grounds, and suit may then be brought thereon. Acceptance of the decision in the present case would leave the matter in confusion because of the conflict of decisions. Without a decision of this Court the Treasury Department is unable to determine the proper principle to apply in such cases.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
*Solicitor General.*

JULY, 1932.

## APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 268:

> SEC. 252. That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342:

> SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:
>
> "SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue

within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918 * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during

the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. Sup. V, Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. Sup. V, Title 26, Sec. 156.)

Treasury Regulations 62:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

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